Petition

81-1241

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In the Supreme Court of the United States

October Term, 1982

ARTHUR GOLDSTEIN

Petitioner

v.

CITY OF NORFOLK

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Counsel for Petitioner

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1. THE QUESTIONS PRESENTED FOR REVIEW

a) Does a city obscenity ordinance, which exempts employees of some disseminators but not others, and which exempts some distributors and exhibitors but not others, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

b) If by judicial construction a state statute and a city ordinance has been interpreted by the State's highest appellate court to require determination by application of community standards whether a work lacks serious literary, artistic, political or scientific value, is not such a statute or ordinance void because of vagueness and overbreadth, violating the First and Fourteenth Amendments to the Constitution of the United States?

2. LIST OF ALL PARTIES

While the caption of the case contains the names of all parties in that Arthur Goldstein is the only petitioner and the City of Norfolk, Virginia is the sole respondent, 28 U.S.C. §2043(b) may be applicable in that the constitutionality of the Code of Virginia is drawn in question by this attack on a parallel city ordinance. Therefore, service hereof shall be had on the Attorney General of the Commonwealth of Virginia pursuant to Rule 28.4(c) of the Rules of the United States Supreme Court.

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5. REFERENCE TO REPORTS OF OPINIONS BELOW

There is no right of appeal in the Virginia courts. Petitioner was denied an appeal from his convictions by the Supreme Court of Virginia on October 7, 1981. Hence, there is no opinion reported below.

6. GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision of the Supreme Court of Virginia refusing the petition for appeal was rendered on the 7th day of October, 1981. This Petition follows within 90 days thereof. Jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

7. PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND CITY ORDINANCES OF THE CITY OF NORFOLK

a) Constitution of the United States:

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV, SECTION 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

b) Statutes of Virginia and Ordinances of the City of Norfolk

§18.2-372 Code of Virginia and §31-84 Norfolk City Code

"The word 'obscene' where it appears...shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value."

§18.2-373 Code of Virginia and §31-85 Norfolk City Code

"Obscene items shall include:
(1) Any obscene book; or
(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph,

film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds."

§18.2-374 Code of Virginia and §31-86 Norfolk City Code

"—It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport...or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, 'distribute' shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another."

§18.2-375 Code of Virginia and
§31-87 Norfolk City Code

"It shall be unlawful for any person knowingly to:
(1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or
(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place."

§31-92 Norfolk City Code

"Any person, firm association or corporation committing an offense under sections 31-86 through 31-91, 31-97 and 31-98 shall be guilty of a misdemeanor and upon conviction thereof shall be confined in jail for not more than twelve months or fined not more than one thousand dollars, either or both."

§18.2-383 Code of Virginia and §31-94 Norfolk City Code

"--Nothing contained in this article shall be construed to apply to:
(1) The purchase, distribution, or loan of any book, magazine, or other printed or manuscript material by any library, school, or institution of higher learning, supported by public appropriation;
(2) The purchase, distribution, exhibition, or loan of any work of art by any museum of fine arts, school, or institution of higher learning, supported by public appropriation;
(3) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum of fine arts, school or institution of higher learning, supported by public appropriation."

§18.2-389 Code of Virginia

"The governing body of any county, city or town is authorized to adopt ordinances to prohibit obscenity or conduct paralleling the provisions of this article, provided that such governing body may not provide a penalty for violating the provisions of such ordinance which is greater than confinement in jail not to exceed twelve months or by a fine not to exceed one thousand dollars, either or both, and provided that the penalty is not greater than the penalty imposed for similar offenses under the provisions of this article."

8. STATEMENT OF THE CASE

Petitioner was tried June 19, 1980 by the court without a jury on five separate indictments charging him with possession with intent to sell obscene items, four of which were magazines and one of which was an object, claimed in the indictment to be a "plastic vagina." The law claimed to be offended was Section 31-86 of the Code of the City of Norfolk, Virginia, 1958, as amended,

which parallels Section 18.2-374 of the Code of Virginia.

Other than the testimony of the Director of Licenses from the office of the Commissioner of the Revenue of the City of Norfolk to prove the petitioner was the licensee at the store known as "Henderson's" from which the items were purchased, the only other witness for the prosecution was police officer James Cochran of the Norfolk Police Department. Cochran testified that he bought the "plastic vagina" and one magazine from the petitioner on March 7, 1980; two other magazines on March 14, 1980; and another magazine on March 23, 1980. These five items constituted the bases for the five indictments.

There was no proffered expert testimony by the prosecution. It was stipulated that petitioner's absent

subpoenaed expert would testify the five items were not obscene.

While the four magazines are definitely explicit, petitioner introduced copies of Penthouse and Playboy magazine, which petitioner contends are no less explicit.

At the conclusion of the prosecution's evidence, petitioner moved to strike the City's evidence on the basis that the City ordinance was unconstitutional (Transcript pp 29, 30, 31). The court reserved its ruling and the petitioner put on his evidence. The matter was briefed and the petitioner expounded on the very points raised in this Petition.

After further argument, defendant petitioner was found guilty on all counts, his constitutional arguments having been overruled.

After receiving a presentence

report from a probation officer of the Court, the petitioner was sentenced on November 18, 1980 to a term of thirty (30) days and fined in the sum of $1,000.00 on each indictment numbered One, Two and Three plus costs. The execution of all except fifteen (15) days of the jail sentence and the imposition of sentence on indictments Four and Five was suspended, and petitioner was placed on unsupervised probation for a term of three years, conditioned upon good behavior.

Goldstein timely pursued his appeal to the Supreme Court of Virginia. Once again he raised his constitutional issues.

His first question presented to the Supreme Court of Virginia was:

> "Does the Norfolk City obscenity ordinance violate the Equal Protection Clause of the Fourteenth Amendment?"

This was the identical issue raised at trial and there rejected.

The second question presented to the Supreme Court of Virginia was:

> "Is the Norfolk City obscenity ordinance unconstitutional and void because of vagueness and overbreadth, violating the First and Fourteenth Amendments?"

Again this was the same issue presented to and rejected by the trial court.

On October 7, 1981, the Supreme Court of Virginia rejected petitioner's appeal. On Goldstein's application, the Virginia Court stayed execution of judgment to allow this petition to be presented.

9. REASONS FOR GRANTING THE WRIT

I

THE NORFOLK CITY OBSCENITY ORDINANCE IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Goldstein is charged with knowingly and unlawfully selling obscene items in violation of Section 31-86 of the Norfolk City Code, which reads in pertinent part: "It shall be unlawful for any person in this city knowingly to: ...(3) Publish, sell...within this city or distribute... any obscene item...." By Section 31-85 of the City Code, obscene magazines, objects and articles are included within the definition of obscene items. So too are films and motion pictures.

Section 31-87 of the City Code then proceeds to exempt employees of a theatre so long as such employee is neither the manager thereof, nor an officer of the entity nor has a financial interest therein.

Furthermore, Section 31-94 exempts 1) the distribution of any obscene book, magazine, or other printed material; 2) the distribution of any obscene

"work of art"; and 3) the exhibition or performance of any obscene play or motion picture where the distribution or exhibition is done by any theatre, museum, school or public library supported by public appropriation.

Thus, where an employee of a bookstore such as Henderson's can be convicted of selling an obscene magazine, an employee of a motion picture theatre could not be convicted of showing an obscene movie. Neither could the librarian of a public library be convicted of lending out the very magazines in controversy were those magazines in the library. Nor could anyone be charged with violation of the City's obscenity law were the most obscene play or motion picture shown at Norfolk's Chrysler Hall or the Chrysler Museum, both of which are supported by public appropriations.

The ordinances thus set up two (or more) classes. Any person, except (1) an employee of any person or legal entity operating a theatre, if the employee is not the manager or an officer thereof or has no financial interest therein except salary or wages and except (2) a person who distributes, exhibits or loans any obscene material under the aegis of a public library, public school or public museum and except (3) a person who exhibits, performs in or shows any obscene play, drama or motion picture in a public theatre, public museum or public school, constitutes the first class. Those persons falling within the three exemptions stated above constitute the second class. A member of the first class is guilty of a misdemeanor and subject to fine and imprisonment if he violates Section 31-86. A member of the second class is not.

While "[e]qual protection does not require that all persons be dealt with identically, ...it does require that a distinction made have relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760 (1966). Although motion pictures are to be accorded the same constitutional protection as are books, Greenmount Sales, Inc. v. Davila, 344 F. Supp. 860 (E.D.Va. 1972), aff'd in part and rev'd in part, 479 F.2d 591 (4th Cir. 1973), a classification based upon control of obscene films and pictures more lenient than those imposed upon books and magazines cannot serve as a rational basis for that classification. See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973), at note 8 (413 U.S. at 26) where it is said that "the States have greater power to regulate nonverbal, physical conduct than to suppress

depictions or descriptions of the same behavior." A fortiori a classification based upon where an obscene book, magazine or other material is sold or where an obscene play or motion picture is shown (other than in one's privacy) cannot serve as a rational basis for that classification.

In Wheeler v. State, 281 Md. 593, 380 A.2d 1052 (1977), the highest Court of the State of Maryland was faced with a state statute that exempted theatre employees in the same identical way theatre employees are exempted in the Norfolk City ordinance. The Maryland statute excluded from the definition of "person" an employee of...[a] legal entity operating a theatre which shows motions pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages." Id. at 1054.

In reaching the conclusion that the statute was unconstitutional on its face by denying the defendant equal protection of the laws, the Wheeler court engaged in a detailed discussion of the Fourteenth Amendment beginning with Mr. Justice Rehnquist's statement in his dissenting opinion in Trimble v. Gordon, 430 U.S. 762, 777, 97 S.Ct. 1459 (1977) that the equal protection clause of the Fourteenth Amendment is "undoubtedly one of the majestic generalities of the Constitution." Id. at 1057.

Noting that equal protection analysis requires strict scrutiny of legislative classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, Wheeler was quick to point out that the statute involved neither a suspect class nor a fundamental right. This was so because obscene material is unprotected by the First Amendment, as this Court has so accurately pointed out.

Therefore, Wheeler went on to the reasonable basis test. In citing the numerous United States Supreme Court cases, the Court described the test to be that a legislative classification must be sustained against equal protection attack unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. The test requires "at a minimum, that a statutory classification bear some 'rational relationship' to a legitimate state purpose." Furthermore, said the Court, "a classification made by a Legislature is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person who assails it has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Id. at 1058. Finally, Wheeler pointed out that:

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have relevance to the purpose for which the classification is made." Ibid.

Having thus set out the not inconsiderable difficulties facing a person attacking a legislative enactment as being deficient in equal protection, the Court likened a film projectionist to a sales clerk in a bookstore. Also, the movie theatre usher who distributes to the theatre patrons a program concerning the film would be exempt, while the bookstore employee distributing the same program would not be exempt. Thus, the Court pointed out, "the law operates on some persons and not upon others like situated or circumstanced."

In holding the statute to be unconstitutional, the Court concluded:

"...[W]hen the governmental objective is to prohibit the distribution of obscene matter, a classification predicated upon control of obscene films and pictures stricter than that imposed on other obscene matter may not be thereby rendered invalid. However, a classification based upon control of obscene film and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective.

"Despite the heavy burden imposed upon Wheeler, he has established that to the extent...[the law] prohibits some employees of legal entities from selling, distributing, publishing and printing obscene matter while allowing other employees to do so, it violates the Equal Protection Clause of the Fourteenth Amendment. The statutory discrimination is not based on differences related to the purpose of the Act in which it is found, and the distinction has no relevance to the purpose for which the classification is made....As the classification applicable...is without any reasonable basis, it is purely arbitrary. We hold it is constitutionally invalid." Id., at 1060.

It is respectfully submitted that

Wheeler is indistinguishable from the instant case. In fact the instant case is stronger, because of the exemptions carved out by Section 31-94 of the City Code.

In the same vein is Leech v. American Booksellers Ass'n, Inc., 582 S.W.2d 738 (Tenn. 1979).

In Leech, the Court microscopically viewed the Tennessee obscenity law and in great detail reviewed "the tortured history of Supreme Court decisions dealing with the 'intractable obscenity problem'" from Roth [Roth v. United States, 354 U.S. 476 (1957)] to Miller [Miller v. California, 413 U.S. 15 (1973)] and beyond through Hamling v. United States, 418 U.S. 87 (1974); Smith v. United States, 431 U.S. 291 (1977); and Pincus v. United States, 436 U.S. 293 (1978).

In addition to finding the statute

unconstitutionally vague, Leech v. American Booksellers Ass'n, Inc., supra at 746, and overbroad, id. at 750, Leech concerned itself with the exclusion from those subject to the act "natural persons acting as agents of a non-taxable entity."

In reaching the same conclusion as did Wheeler v. Maryland, supra, and in fact citing Wheeler, Leech found the statute lacking in equal protection safeguards as follows:

> "Two conclusions are inescapable. First, the use of taxable entity for inclusion and nontaxable entity for exclusion is too nebulous, too lacking in definite limits, and too vague to inform men of common intelligence who is included and who is exempt from the criminal penalties of the Tennessee Obscenity Act....
>
> "Second, if 'nontaxable entity' could be construed to exempt those religious, charitable, scientific or educational general welfare corporations that pay no taxes and include those who pay any taxes, however small, the classification would have no rational basis in the context of the criminal offense involved herein

> and would be void under the Equal Protection Clause of the federal and state constitutions." Id. at 755.

To the same effect that carved out exceptions deny equal protection of the law, see City of Duluth v. Sarette, 383 N.W.2d 533 (Minn. 1979).

In contrast to Maryland's Wheeler decision, Tennessee's Leech case and Minnesota's Sarette, the State of Washington in State v. J.R. Distributors, Inc., 82 Wash. 2d 584, 512 P.2d 1049, cert. den. 418 U.S. 954, 41 L.Ed. 1166, 94 S.Ct. 3217 (1974) held that the Equal Protection Clause was not offended by such exceptions. So too has California ruled in People v. Kuhns, 61 Cal. App.3d 760, 132 Cal. Rptr. 725 (1976) and in other cases.

It thus appears that there is a conflict between state courts of last resort dealing with this interpretation

of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

With Maryland, Tennessee and Minnesota in one camp and Washington and California in the other, certainly the considerations of Rule 17(b) of the Rules of the Supreme Court of the United States governing review on certiorari appear to come into play.

II

THE NORFOLK CITY OBSCENITY ORDINANCE IS UNCONSTITUTIONAL AND VOID FOR VAGUENESS AND OVERBREADTH, VIOLATING THE FIRST AND FOURTEENTH AMENDMENTS.

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973) established the following guidelines to use in determining whether a work is obscene:

"(a) Whether the average person, applying contemporary community standards

would find that the work, taken as a whole, appeals to the prurient interest, ...

"(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

"(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24.

The Miller test replaced the long established constitutional test of obscenity enunciated in Roth v. United States, 354 U.S. 476 (1957).

Before Miller was decided, one Bobby A. Price was convicted for exhibiting an allegedly obscene motion picture in violation of the Virginia obscenity statute. His conviction under the Roth test was affirmed in Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972).

Price's case was remanded by the Supreme Court of the United States in light of Miller and companion cases decided with Miller.

On remand, this Court once more affirmed Price's conviction by applying the Miller standards and by accepting the invitation of the Supreme Court of the United States to define or modify or "narrow" the breadth of the statute by judicial construction. Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974). At 214 Va. 493, the Court said: "We have narrowed this definition [of obscenity] by judicial construction." And again: "We conclude that the Virginia obscenity statute, as construed...." [emphasis added].

Price II then goes on to remold Virginia's obscenity laws to comply with Miller by finding that the jury's determination that the Price film was

"utterly without redeeming social value" (the Roth test) would place it within the ambit of the Miller test of lacking serious literary, artistic, political or scientific value when taken as a whole. A reading of Price I makes it clear that the jury was permitted to determine by community standards whether or not the film lacked social value. The approved instruction in Price I read in pertinent part: "The Court instructs the jury that the test to determine obscenity is as follows: Whether to the average person, applying contemporary community standards: ...the material is utterly without redeeming social value." Price v. Commonwealth, 213 Va. 113, 120, 189 S.E.2d 324, 330 (1972) (emphasis added). This was approved in Price II.

But such an interpretation is incorrect. The literary, artistic, political or scientific value of

sexually oriented expression is not "to be judged on such a parochial basis." United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977). Contrary to Price I and Price II an objective standard is to be applied to the determination of serious literary, artistic, political or scientific value under Miller and not community standards. Smith v. United States, 431 U.S. 291 (1977); United States v. Heyman, supra; State v. Princess Cinema of Milwaukee, Inc., 96 Wis. 2d 646, 292 N.W. 2d 807 (1980).

In United States v. Heyman, supra, the trial Court instructed the jury, over the objection of the defendant, that community standards should be used to ascertain the scientific value of the contested matter. In reversing, the Fourth Circuit Court of Appeals pointed out that Miller confined the application of contemporary community standards to

determine whether the work a) appeals to the prurient interest, or b) is patently offensive. The third prong of the Miller test, namely, the determination of serious literary, artistic, political, or scientific value requires the application of an objective standard. Smith v. United States, supra.

It becomes apparent that the Price II construction of the Virginia statute (and the Norfolk ordinance which parallels the statute) is in itself unconstitutional because it impermissibly allows a local determination as to whether the work, taken as a whole, lacks value. Thus, the statute as construed is overbroad and unenforceable. State v. Princess Cinema, supra.

Faced with the identical problem, the Supreme Court of Wisconsin in State v. Princess Cinema, supra, declined to judicially reconstrue its obscenity laws

to correct its previously erroneously conceived notion of Miller. In that case, the Wisconsin Court acknowledged that after Miller was decided, it instructed its trial courts to apply contemporary community standards to determine the value of works charged with being obscene. Not until Smith was decided three years later did this misconception of Miller become apparent. The Court then went on to acknowledge that the Wisconsin obscenity law as construed by it was unconstitional for overbreadth. Rather than redefine its statute, the Wisconsin Court said, in language so strikingly similar to that used time and again by this Court that:

> "...The job of drafting of penal legislation is primarily one for the legislature. This court is once again being asked to judicially amend the obscenity statute to bring it into compliance with the presently perceived standards emanating from the United States Supreme Court....We conclude, at this time, that this is a

> determination for the legislature." State v. Princess Cinema, supra, at 813, 814.

In the same way, the Tennessee Supreme Court declined to reinterpret its obscenity law but passed it on to the legislature to address that problem. Leech v. American Booksellers Ass'n, Inc., supra at 756.

It thus appears that the Supreme Court of Virginia misconstrued Miller and affirmed the Price conviction which allowed the jury to determine value by community standards. As thus construed, the Virginia statute (and identical city ordinance) runs counter to this court's ruling in Smith v. United States, supra and is unconstitutional.

The Virginia court of last resort has decided this federal question in a way in conflict with decisions of this court giving rise to the consideration

expressed in Rule 17(c) of the Rules of the United States Supreme Court governing review on certiorari.

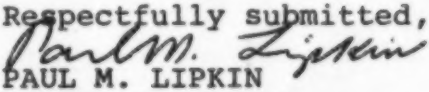
10. CONCLUSION

Norfolk City's obscenity ordinances parallel the statutes of Virginia. The exemptions carved out deny petitioner the equal protection of the laws afforded him by the Fourteenth Amendment.

Moreover, because the Supreme Court of Virginia has construed its obscenity laws so as to allow the trier of fact to apply local community standards in determining whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value, such statute (and ordinance) is unconstitutionally overbroad.

Goldstein's conviction ought to be reversed and he be dismissed.

Respectfully submitted,



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Counsel for Petitioners

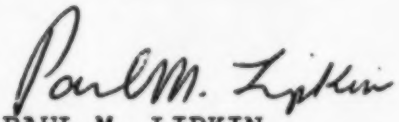
11. CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of Virginia upon counsel for the Respondent, Philip R. Trapani, City Attorney, City of Norfolk, 908 City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I further certify that I have served a copy of this Petition upon the Attorney General of the Commonwealth of Virginia, by depositing copies of said Petition in the United States Mail properly addressed at Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219 with sufficient postage thereon to insure delivery.

I hereby certify that all parties

required to be served have been served on or before the 5th day of January, 1982.



PAUL M. LIPKIN
Of Counsel for
Petitioner

APPENDIX

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 7th of October, 1981.

Arthur Goldstein, Appellant,

against Record No. 810276
Circuit Court No. M1621-80

City of Norfolk, Appellee.

From the Circuit Court of the City of Norfolk

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

APPENDIX B

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 18th day of November, in the year 1980

COMMONWEALTH vs. Arthur Goldstein

(Docket #C5614004, C5615004 & C5616004)

Attorney for the City of Norfolk: Benjamin Bull

Attorney for the defendant: Samuel Goldblatt and Paul Lipkin

( ) Heretofore appointed by the Court
(x) Of defendant's own choosing

MISDEMEANOR SENTENCING ORDER

This day again came the Attorney for the City of Norfolk and the attorney for the defendant, as aforesaid, and came as well the defendant in person, who stands convicted of Possession of Obscene Item with Intent to Sell same as charged in misdemeanor indictments numbered One through Five.

Thereupon the Probation Officer of this Court, to whom this case has been

previously referred for investigation, appeared in open Court with a written report, a copy of which has been delivered to counsel for the defendant. Whereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case. Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the defendant, doth now fix the defendant's punishment at confinement in the City Jail for the term of 30 days and fined in the sum of $1,000.00 on each indictment numbered One, Two and Three, and that he be required to pay the costs of his prosecution. The Court doth adjudge and order that the execution of all except 15 days of the aforesaid jail sentence and the imposition of sentences on indictments numbered Four and Five be suspended and the defendant be placed on unsupervised probation for the term of

Three Years, conditioned upon good behavior, and the payment of the fines and court costs in the sum of $3,079.25. Thereupon on motion of the defendant, by counsel the Court doth grant a 30 day stay, doth allow the defendant to remain on bond and doth order that this case be set on the docket at 9:00 AM 12-19-80 for disposition.

And the defendant was allowed to depart pursuant to the terms of his recognizance.

/s/ Wm. Moultrie Guerry

APPENDIX C

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 15th day of October, in the year 1980

CITY OF NORFOLK vs Arthur Goldstein

Attorney for the City of Norfolk:
Benjamin Bull
Attorney for the accused:
Samuel Goldblatt & Paul Lipkin

O R D E R

This day again came the defendant in person and by Counsel, and came as well the Attorney for the City of Norfolk, pursuant to ORDER of this Court heretofore entered on the 8th day of October 1980 wherein the matter the matter of a finding in the matter was taken under advisement.

It is now the finding of this Court that the defendant is Guilty as charged in the aforesaid Misdemeanor Indictments #1, #2, #3, #4 and #5 for Possession of Obscene Items with Intent to Sell and doth order that this matter be referred to the Probation Officer of this Court for a Presentence Report,

the Hearing on which will be held on the 18th day of November 1980 at 9:00 A.M.

And the defendant was allowed to remain on bail bond and to depart.

Wm. Moultrie Guerry, Judge

APPENDIX D

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 19th day of June, in the year 1980

CITY OF NORFOLK vs. Arthur Goldstein

(W/M DOB:061414)

Attorney for the City of Norfolk: Benjamin Bull
Attorney for the accused: Samuel Goldblatt and Paul Lipkin

MISDEMEANOR TRIAL ORDER

This day came the Attorney for the City of Norfolk and the attorney for the accused, as aforesaid, and came as well the accused in person, who stands indicted on Misdemeanor indictments for Possession of Obscene Item with Intent to Sell Same on misdemeanor indictments #1, #2, #3, #4 and #5.

Whereupon the accused was duly arraigned and after private consultation with and being advised by his counsel tendered in person his plea of Not Guilty to the said indictments, and thereupon after having been first advised by counsel and by the Court of

his right to trial by jury, the accused knowingly and voluntarily waived trial by jury, and with the concurrence of the Court and of the Attorney for the City of Norfolk, entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law. Thereupon having heard all the evidence introduced on behalf of the City of Norfolk the defendant by counsel moved the Court to strike the evidence for reasons stated to the record which motion being fully heard and argued are taken under-advisement. Thereupon the Court doth order that the findings be taken under advisement and the counsel for the defendant prepare briefs by the 21st day of July 1980 and that the City of Norfolk answer such briefs by the 28th day of July 1980.

And the defendant was allowed to depart.

Wm. Moultrie Guerry, Judge

(Court Reporter Sarah Trueax
(Retained by defendant)

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of November, 1981.

Arthur Goldstein, Appellant,

against Record No. 810276
Circuit Court No. M1621-80

City of Norfolk, Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on October 7, 1981, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on October 7, 1981, be, and the same is hereby, stayed, to and including the 5th day of January, 1982, on the expiration of which time the

same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A copy,

Teste:

/s/Allen L. Lucy

Clerk

Opposition

Office - Supreme Court, U.S.
FILED
FEB 3 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 81-1241

In the Supreme Court of the United States

October Term, 1982

ARTHUR GOLDSTEIN,
Petitioner,

v.

CITY OF NORFOLK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PHILIP R. TRAPANI
CITY ATTORNEY
MARY L.G. NEXSEN
ASSISTANT CITY ATTORNEY
LYDIA C. TAYLOR
ASSISTANT CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
Tel. No. (804) 441-2871
Counsel for Respondent

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ARTHUR GOLDSTEIN

Petitioner

v.

CITY OF NORFOLK

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP R. TRAPANI
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ASSISTANCE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
Tel. No. (804) 441-2871

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court should refuse to receive the Petition for Writ of Certiorari in this case since the Petitioner has failed to file his Petition within the prescribed time limit and has further failed to move the Court for an extension of time.

II. Whether the obscenity ordinance of the City of Norfolk violates the Equal Protection Clause of the Fourteenth Amendment.

III. Whether the obscenity ordinance under which Petitioner was convicted is unconstitutional for vagueness and overbreadth.

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PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND ORDINANCES OF THE CITY OF NORFOLK

The Respondent adopts Petitioner's statement of the pertinent provisions, with the following addition:

Section 1-3 of The Code of the City of Norfolk, Virginia, 1958, as amended:

Sec. 1-3. Separability.

> If any part or parts, section or subsection, sentence, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Code.

The Code of the City of Norfolk, Virginia, 1958, as amended, has been recodified effective January 1, 1982, and the following sets forth the new section numbers of the pertinent provisions:

The Code of the City of Norfolk, Virginia, 1958, as amended	Code of the City of Norfolk, Virginia, 1979, as amended
Section 1-3	Section 1-12
31-84	28-2
31-85	28-3
31-86	28-4
31-87	28-5
31-92	28-1
31-94	28-16

STATEMENT OF THE CASE

Respondent concurs with Petitioner's statement of the case with the following addition:

At the trial, the City introduced testimony that Arthur Goldstein was the owner, proprietor and business licensee of Henderson's Book Store at 311 Granby Mall in Norfolk.

At no time did the Petitioner offer or solicit any evidence that he was not the owner of the store, nor did he show that he had no managerial responsibility or financial interest other than wages in the store.

I.

THE COURT SHOULD REFUSE TO RECEIVE THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE SINCE THE PETITIONER HAS FAILED TO FILE HIS PETITION WITHIN THE TIME LIMIT OF 60 DAYS PRESCRIBED UNDER RULE 20.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES AND HAS FURTHER FAILED TO MOVE THE COURT FOR AN EXTENSION OF TIME UNDER SAID RULE.

The Supreme Court of Virginia refused Petitioner Goldstein's petition for appeal by a decision dated October 7, 1981. (Appendix A) Petitioner's Certificate of Service in his Petition for a Writ of Certiorari to the Supreme Court of Virginia is dated January 5, 1982, which date is 90 days after entry of the Supreme Court of Virginia judgment, as noted by the Petitioner in his Grounds Upon Which Jurisdiction Is Invoked. Rule 20.1 of the Revised Rules of the Supreme Court of the United States, adopted April 14, 1980, effective June 30, 1980, states:

> .1. A petition for a writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

Although this Court has held that Rule 20 is not jurisdictional (Heflin v. United States, 358 U.S. 415, 3 L.Ed.2d 407, 79 S.Ct. 451 (1959)), and thereby has precluded the application of Rule 20.3, which states that "the Clerk will refuse to receive any petition for writ of certiorari which is jurisdictionally out of time", the bases upon which the Court has waived this filing time requirement in other cases are not present in Petitioner's case. In Heflin v. United States, supra, the petitioner was a prisoner in custody at the time his overdue

petition was filed, and the filing time requirement was waived under 28 U.S.C. §2255 and Rule 35 of the Federal Rules of Criminal Procedure, which allow motions for relief from and the correction of an illegal sentence "at any time". Petitioner in the instant case is neither in custody nor has he invoked the jurisdiction of the Court under 28 U.S.C. §2255.

The discretion of a Justice in extending the time for applying for a writ of certiorari may be exercised "for good cause shown." Rule 20.1. In Schacht v. United States, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970), the overdue petition for certiorari was accompanied by a motion, supported by affidavits that presented facts showing that the petitioner had acted in good faith and that the delay in filing the petition was caused by circumstances beyond his control. The Court considered the motion

and affidavits before permitting the untimely filing of the petition. 398 U.S. at 64. See Durham v. United States, 401 U.S. 481, 28 L.Ed.2d 200, 91 S.Ct. 858 (1971), (overruled on other grounds, Dove v. U.S., 423 U.S. 325, 46 L.Ed.2d 531, 96 S.Ct. 579 (1976)); and Sanabria v. United States, 437 U.S. 54, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978).

Petitioner Goldstein has filed no motion for an extension of time and has submitted no affidavits upon which the Court could base a finding of "good cause" and thereupon grant him an extension of time in which to file his Petition.

II.

THE CITY OF NORFOLK'S OBSCENITY ORDINANCES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. There Is A Rational Basis For The Statutory Exemption Of Certain Persons From Prosecution Under Norfolk City Code Sections 31-87 and 31-94.

Statutes identical to the challenged Norfolk City Code Sections 31-87 and 31-94 have been upheld as not violative of the Equal Protection Clause in a number of decisions. In State v. J. R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049, cert.denied, 418 U.S. 954, 41 L.Ed. 2d 1166, 94 S.Ct. 3217 (1974), involving substantially identical legislation and issues, it was held that equal protection was not violated by a statutory distinction between mere theatre projectionists, on one hand, and other theatre and bookstore employees on the other hand. The court in that case recognized that if any state of facts reasonably could be conceived that would sustain the statutory classification, then there was a presumption that those facts existed. Further, the burden upon one who challenges the classification to show that it fails to

rest upon any reasonable or rational basis and is essentially arbitrary:

> There are valid reasons for the classification. The following are by no means exclusive: (1) Book and magazine stores offer a wide range of materials from which both the customer and clerk may select at the time of sale. Each has an opportunity to choose that which will be sold or purchased. On the other hand, motion pictures are shown one reel at a time and the projectionist must exhibit those selected by the manager. (2) Projectionists do not decide which films to exhibit and, thus, should not be obliged to make a judgment as to their obscenity. Furthermore, to require a projectionist to decide whether the showing of a particular film would be a crime might tend to "chill" the dissemination of borderline, but constitutionally protected motion pictures.

512 P.2d at 1061-1062.

In discussing the exemption from prosecution allowed libraries, museums and universities that are publicly supported, the court in State v. J. R. Distributors, supra, stated that porno-

graphic materials may be allowed to be shelved in these educationally oriented institutions as examples of obscenity. Id. at 1061.

The Supreme Court of California, when confronted with this issue, consistently has upheld similar legislation as being based upon a reasonable classification. In ruling upon a California statute identical to ordinances in the instant case, the court, in People v. Kuhns, 61 Cal. App.3d 760, 132 Cal.Rptr. 725 (1976), stated that:

> We hold...that the exemption of projectionists is valid and does not violate the equal protection clause because it tends to promote rather than inhibit dissemination of speech as protected by the First Amendment which constitutes a compelling state interest justifying the classification.

132 Cal.Rptr. at 739. The California Supreme Court had ruled precisely the same way when confronted with this very

issue on two earlier occasions. See Gould v. People, ex rel. Busch, 56 Cal. App.3d 923, 128 Cal.Rptr. 743 (1976) and People v. Haskins, 55 Cal. App.3d 242, 127 Cal.Rptr. 426 (1976).

Other rational bases for dissimilar treatment of certain theater employees were set forth by Chief Justice Murphy in his dissenting opinion in Wheeler v. Maryland, 380 A.2d 1052 (Md. 1977). In a motion picture theatre the necessity for employees to have contact with a film is minimal. Even the contact of a projectionist is limited. However, a seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all who enter the theatre to see a film, no such controls are present when obscene materials, such as a maga-

zine, are once removed from the seller's premises. It is unlikely that a film will be transported from a theatre so as to become available for viewing by juveniles.

B. Petitioner Has No Standing To Challenge The Exemptions Contained In Norfolk City Code Sections 31-87 and 31-94.

Petitioner contends that the exemptions from prosecution under Norfolk City Code Sections 31-87 and 31-94 for movie theatre employees who have no managerial responsibilities, are not officers of the business, and have no financial interest therein, as well as for employees of publically supported entities, constitute a violation of equal protection. The uncontroverted evidence at trial in the instant case was that Petitioner Goldstein was the owner and operator of the establishment which sold the obscene materials and that he was the seller of

the items in question.

If a defendant challenges a statutory limitation or exemption, and claims a denial of equal protection in reference thereto, he must qualify himself as a member of the group affected. This principle is well-recognized in both civil and criminal law. Rosenthal v. New York, 226 U.S. 260, 271, 57 L.Ed. 212, 33 S.Ct. 27 (1912); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576, 59 L.Ed. 364, 35 S.Ct. 167 (1915). As stated in Arkadelphia Co. v. St. Louis Ry. Co., 249 U.S. 134 at 149, 63 L.Ed. 517, 39 S.Ct. 237 (1919):

> It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the constitutional feature.

Petitioner has no standing to challenge the exemption provided to certain movie theatre employees or to employees

of theatres, libraries, museums or schools which receive public appropriations, since he is not in a position similar to any of those exempted employees who receive only salaries and wages from the business.

C. Any Part Or Parts Of Norfolk City Code Sections 31-87 And 31-94 Which May Be Deemed Invalid Could Be Severed, And The Remaining Portions Of The Statutes Would Remain Valid.

Even assuming arguendo that the exceptions in Sections 31-87 and 31-94 are violative of the Equal Protection Clause, the section under which petitioner was convicted (§31-86) is severable pursuant to Section 1-3 of the Norfolk City Code, which provides that:

> If any part or parts, section or subsection, sentence, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Code.

In his equal protection argument, Petitioner relies on Wheeler, supra, but since the Code of the State of Maryland had no severability proviso, Wheeler may be distinguished on the applicable law.

A statute may be valid in one part and invalid in another, and if the invalid is severable from the remainder, then that invalid part may be ignored, if, after such elimination, the remaining portions are sufficient to accomplish their purpose in accordance with the legislative intent. Only if the void portion is the inducement to the passage of the act, or is so interwoven in its texture as to prevent the statute from becoming operative in accordance with the will of the legislative body, is the whole statute invalid. Allen v. Norfolk, 196 Va. 177, 83 S.E.2d 397 (1955); New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947); Board

of Supervrs. v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975).

Absent any written opinion from the Virginia Supreme Court on Petitioner's appeal, this Court should presume that the state court's decision was based on adequate non-federal grounds - lack of standing and/or severability.

Petitioner must show from the record that the Virginia Supreme Court decided the issues on the basis of federal questions presented to it. Where the record is silent as to the basis for the court's ruling and where adequate non-federal grounds existed for the decision, the presumption is that the state court did not base its decision on the federal questions and this Court should decline jurisdiction. Lynch v. New York ex. rel. Pierson, 293 U.S. 52, 54-55, 79 L.Ed. 191, 55 S.Ct. 16 (1934). "Where the highest court of the state delivers no opinion

and it appears that the judgment [below] might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Stembridge v. Georgia, 343 U.S. 541, 547, 96 L.Ed. 1130, 1134, 72 S.Ct. 834 (1952) (cited in Durley v. Mayo, 351 U.S. 277, 281, 100 L.Ed. 1178, 76 S.Ct. 806 (1956)).

III.

THE OBSCENITY STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

No substantial federal question is before the Court in this case. Two substantially identical state statutes have been upheld by this Court; thus, the wording of the statute is not open to attack.

The Virginia Supreme Court has traditionally followed this Court's evolving interpretations of obscenity in construing its obscenity laws. Petitioner's major

attack is on Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972) (Price I), which approved jury instructions that the Petitioner claims erroneously test the value of a work by community standards. That decision, however, is no longer the law in Virginia. It was vacated and remanded by this Court for reconsideration in light of Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) (Miller I) and companion cases. The Virginia Supreme Court construed the Virginia statute to follow the Miller I guidelines and reaffirmed the conviction based on an independent review of the film. Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974) (Price II). Price II is now the authoritative construction of Virginia's obscenity statute; it correctly applies the law as set out in Miller I.

Even were Price I an incorrect statement of the law and controlling precedent in Virginia, there are no jury instructions involved in the instant case and no indication in the record that the trial judge, who sat as the trier of fact, misapplied the law of obscenity as stated by this Court. Judges, when sitting as triers of fact, are presumed to apply the law correctly, including the most recent pronouncements of this Court. This Court should decline to accept jurisdiction for want of a substantial federal question.

A. Obscenity Statutes Substantially Similar To Virginia's, Once Construed To Conform to Miller I, Have Been Approved By This Court.

In Miller I, this Court redefined the standards for judging obscenity, softening the requirement that material, to be obscene, must be utterly without redeeming social value, the criterion articulated in A Book Named "John

Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 419, 16 L.Ed.2d 1, 86 S.Ct. 975 (1966). Miller I eliminated that requirement; the obscene work need only be lacking in serious literary, artistic, political or scientific value. Miller I, supra, at 24-25. National community standards also were no longer constitutionally required. Id. at 30-34. Numerous state cases, among them Price I, supra, were vacated and remanded for reconsideration in light of Miller I and its companion cases.

States did not have to rewrite their obscenity statutes on remand if those statutes were authoritatively construed to meet the Miller guidelines.[1] A year

[1]Citing two examples of statutes that would pass constitutional muster, the Court in Miller I wrote, "Other existing state statutes, as construed heretofore or hereafter, may well be adequate." Id. at 24, n. 6 (emphasis supplied). See also id. at 24, 25 and 27.

later, in United States v. Hamling, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974), the Court, after reinterpreting a federal statute to include those guidelines, reaffirmed its intention to allow the states to do the same: "We made clear in Miller ... that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes [may well be adequate]." Id. at 112-113.

Two state statutes, substantially similar in wording to that of Virginia, were approved by this Court after authoritative construction by the state courts in light of Miller I. In Ward v. Illinois, 431 U.S. 767, 52 L.Ed.2d 738, 97 S.Ct. 2085 (1977), Illinois' obscenity statute was upheld against a challenge for vagueness and overbreadth. The highest Illinois court in an earlier case had reinterpreted its obscenity statute in light of Miller

I. The statute read:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

Ward, supra, at 770. The Illinois Supreme Court, in reinterpreting that statute, had elected "to retain the 'utterly without redeeming social value' standard of Memoirs in preference to the more relaxed criteria contained in part (c) of the Miller guidelines." Id. at 774. The Illinois statute, now in line with Miller I, was upheld as constitutional. Id. at 776. Norfolk's obscenity ordinance, and the Virginia statute on which it was modeled, Va. Code Ann. §18.2-372 (Repl. vol. 1975), are worded in a substantially similar manner to the Illinois statute upheld in Ward.

> The word "obscene" where it appears in sections 31-85 through 31-99 of this Code shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to prurient interest in sex; that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

Norfolk City Code, 1958, §31-84 (as amended 1976). The only distinction is that the Norfolk ordinance substitutes the third part of the Miller test for the more stringent one in Memoirs.

On remand from Miller I, the California statute involved in that case was reconstrued by the state court in light of Miller I, and Miller's conviction was reaffirmed. The second appeal to this

Court was dismissed for "want of a substantial Federal question," despite a constitutional challenge to the statute for vagueness and overbreadth. Miller v. California, 418 U.S. 915, 41 L.Ed.2d 1158, 94 S.Ct. 3206 (1974) (Miller II). As cited in Justice Brennan's dissent, that statute was nearly identical to Norfolk's except for the retention of the Memoirs value test.

> "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

Id. at 916 (Brennan, J., dissenting). Thus, two statutes nearly identical to the one at issue here have been upheld

after authoritative state-court constructions conforming the statutes to Miller I.[2] Because the Virginia statute also has been interpreted by the highest court of that state to follow the guidelines of Miller I, see textual discussion part (C) infra, the constitutionality of the law under which Petitioner was convicted is not a substantial federal question.

B. The Virginia Supreme Court Has A Tradition Of Following Carefully This Court's Pronouncements On Obscenity.

The Virginia Supreme Court has traditionally interpreted Virginia's obscenity statutes in light of United States Supreme Court opinions. Both House v. Commonwealth, 210 Va. 121, 125, 169 S.E.2d 572, 575 (1969) and Price I, supra, care-

[2] Hicks v. Miranda, 422 U.S. 332, 343-344, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975), makes clear that the dismissal of the appeal in Miller II was a decision on the merits as to the constitutionality of the California statute.

fully followed the test set out in Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), adding the third prong set out in Memoirs, supra. When confronted with obscenity questions not yet decided by this Court, the Virginia holdings have correctly anticipated this Court's later opinions. E.g., Price I, supra, at 116 (No expert witness is needed in obscenity cases); id. at 118 (Courts must make an independent determination of obscenity on review); Alexander v. Commonwealth, 212 Va. 554, 555, 186 S.E.2d 43 (1972), vacated and remanded, 413 U.S. 836 (1973), on remand, 214 Va. 539, 203 S.E.2d 441 (1974) (National standards are not constitutionally required; standards of the local community may be used to judge obscenity).

C. The Current Authoritative Interpretation Of The Virginia Obscenity Statute Is Contained In Price II, Which Construed That Statute In Light Of Miller I.

Petitioner insists that the Virginia Supreme Court, despite a clear tradition of deference to this Court's pronouncements on obscenity, now requires the application of community standards to the third prong of the Miller I test, in contravention of recent case law from this Court. It is not clear whether this Court in Smith v. United States, 431 U.S. 291, 301, 52 L.Ed.2d 324, 97 S.Ct. 1756 (1977), totally ruled out the use by states of community standards to judge the value of obscene material, but Virginia has not upheld that use since Miller I. Petitioner points to the pre-Miller case of Price I, but in that case the Virginia Supreme Court used the Roth - Memoirs test to conduct an independent review of the film to determine its obscenity. The court, in affirming that conviction, upheld an instruction to the jury to apply contemporary community

standards to all three prongs of the test, Price I, supra, at 120-121 & n. 5, but it also viewed the film, id. at 118, and independently found it to be utterly without redeeming social value, id. at 119.

More importantly, Price I is no longer valid precedent on obscenity by lower Virginia courts. This Court vacated and remanded that decision to the Virginia Supreme Court on June 25, 1973, for reconsideration in light of Miller I and companion cases. The decision on remand, Price II, is the current authoritative construction of the Virginia obscenity statute. The state court reinterpreted its obscenity statute in light of Miller I, stating:

> The only new questions now presented to us are whether Code §18.1-230 is unconstitutionally vague or overbroad in light of the new test of obscenity promulgated in Miller, ...

Price II, supra, at 491. The Court then

quoted the Miller guidelines and reviewed its own prior obscenity decisions following successive pronouncements by this Court, concluding that the Virginia statute was constitutional as construed in light of Miller I. The court's only consideration of jury instructions was to dismiss appellant's protest of the use of the "utterly without redeeming social value" test; the issue of using community standards to judge that value was not ever raised on remand. The court held that a conviction using the Memoirs social value test was valid after Miller I because, if the film met the Memoirs test, it "would necessarily be obscene under part (c) of the Miller test, which is broader and less rigorous than the test applied in Price." Id. at 494. This identical reasoning was followed by this Court in Hamling, supra, at 116-117.

Additionally, the reaffirmation in

Price II was not grounded on the jury's verdict but on the court's independent finding, after viewing the film, that the film was obscene under the Miller test and utterly without redeeming social value.

D. Nothing In The Record Indicates A Misapplication Of The Law Of Obscenity By The Trial Judge, Who Is Presumed To Have Correctly Applied The Law When Sitting As A Trier Of Fact.

Nothing in Price II's reinterpretation of Virginia's obscenity statute in light of Miller would lead a lower court to use community standards to gauge the value of a work. On the contrary, lower Virginia courts after Price II have closely followed the Miller test, which did not discuss the third part of the test in terms of community standards and subsequent Supreme Court decisions. Petitioner's argument assumes that the trial judge looked to the jury instructions up-

held in Price I, which was no longer binding precedent in Virginia, and ignored the Miller I test, as well as this Court's indication in Smith that community standards should not be used to test the value of a work. Trial judges, however, take an oath of office to uphold the United States Constitution, as authoritatively construed by this Court.

Petitioner presents no proof in the record but merely assumes that the judge misapplied the law. In fact, Respondent is entitled to a contrary legal presumption: that judges, sitting as triers of fact, are presumed to apply the law correctly. Therefore, barring any indication in the record that the trial judge in the instant case misinterpreted the law of obscenity, this Court should presume that the judge knew and applied the law correctly.

IV.

CONCLUSION

The exemptions outlined in the Norfolk obscenity ordinances are identical to exemptions found in other state statutes which have been reviewed by the courts and deemed to have rational bases for the distinctions created.

Petitioner, nevertheless, lacks standing to challenge the statutory exemptions since he has failed to qualify himself as a member of the affected group. In addition, even if the exemption portions of the Norfolk ordinances were held to be unconstitutional, they could be severed from the remaining valid portions.

Since the questions of standing and severability are adequate non-federal grounds for the Virginia Supreme Court's decision in this matter, there is no substantial federal question which this Court should review.

The statute at issue is substantially identical to two others upheld by this Court, and it has been construed authoritatively to conform to Miller. The post-Miller I construction in Price II does not purport to allow the trier of fact to apply community standards in determining the value of the work, and such was not its effect. More importantly, the presumption is that a trial judge, who has taken an oath to uphold the Constitution, correctly applies the law when sitting as a trier of fact. Nothing in this record indicates that he did otherwise. This Court, therefore, should decline to review Petitioner's conviction.

Respectfully submitted,

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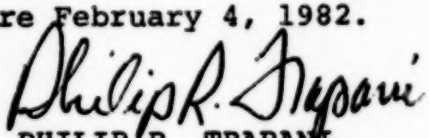
CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Petition for a Writ of Certiorari upon counsel of record for the Petitioner, Paul M. Lipkin and Samuel Goldblatt, Goldblatt, Lipkin, Cohen, Anderson & Jenkins, a professional corporation, 804 Plaza One Building, Norfolk, Virginia 23510, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the Petitioner as set forth above, on or before February 4, 1982.

I further certify that I am a member of the bar of this Court, and that all

parties required to be served have been served on or before February 4, 1982.



PHILIP R. TRAPANI

Of counsel for
Respondent

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 7th of October, 1981.

Arthur Goldstein, Appellant,

against Record No. 810276
Circuit Court No. M1621-80

City of Norfolk, Appellee.

From the Circuit Court of the City Norfolk

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk